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IN THE

Supreme Court of the United States

October Term, 1971
No. 69-5001

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Motion for Leave to File Brief Amici Curiae and Statement of Interest of the Amici.

Movants N.A.A.C.P. Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent respectfully move the Court for permission to file the attached brief *amici curiae,* for the following reasons. The reasons assigned also disclose the interest of the *amici.*

(1) Movant N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty to employ legal counsel on their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Le-

gal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in matters resulting in decisions that have had a profoundly reformative effect upon the administration of criminal justice.

(2) A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless, who too often are Negroes. In order more effectively to achieve this purpose, the LDF in 1965 established as a separate corporation movant National Office for the Rights of the Indigent (NORI). This organization, whose income is provided initially by a grant from the Ford Foundation, has among its objectives the provision of legal representation to the poor in individual cases and the presentation to appellate courts of arguments for changes and developments in legal doctrine which unjustly affect the poor.

(3) LDF attorneys have handled many capital cases over the years, particularly matters involving Negro defendants charged with capital offenses in the Southern States. This experience has led us to the view, confirmed by the studies of scholars[1] and more recently

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[1] *E.g.*, President's Commission on Law Enforcement and Administration of Justice, Report, *The Challenge of Crime in a Free Society* 143 (1967); United Nations, Department of Economic and Social Affairs, Capital Punishment—Developments 1961-1965 (ST/SOA/SD/10) 20 (1967); Weihofen, the Urge to Punish 164-65 (1956); Hartung, *Trends in the Use of Capital Punishment*, 284 Annals 8, 14-17 (1952); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. Crim. L., Crim & Pol. Sci. 301 (1962).

by empirical research undertaken under LDF auspices,[2] that the death penalty is administered in the United States in a fashion that makes racial minorities, the deprived and downtrodden, the peculiar objects of capital charges, capital convictions, and sentences of death. Our experience has convinced us that this and other injustices are referable in part to certain common practices in capital trial procedure, which depart alike from the standards of an enlightened administration of criminal justice and from the minimum requirements of fundamental fairness fixed by the Constitution of the United States for proceedings by which human life may be taken. Finally, we have come to appreciate that in the uniquely stressful and often contradictory litigation pressures of capital trials and direct appeals, ordinarily handled by counsel appointed for indigent defendants, many circumstances and conflicts may impede the presentation of attacks on these unfair and unconstitutional practices; and that in the post-appeal period, such attacks are grievously handicapped by the ubiquitous circumstances that the inmates of the death rows of this Nation are as a class impecunious, mentally deficient, unrepresented and therefore legally helpless in

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[2]A study of the effect of racial factors upon capital sentencing for rape in the Southern States (which virtually alone retain the death penalty for that crime) was undertaken in 1965, with LDF financial support, by Dr. Marvin E. Wolfgang and Professor Anthony G. Amsterdam. The nature of the study is described in the memorandum appended to the report of *Moorer v. South Carolina*, 368 F.2d. 458 (4th Cir. 1966), and in *Matter of Sims and Abrams*, 5th Cir. Nos. 24271-2, decided August 10, 1967. Its results, so far analyzed, show persuasively that the death penalty is discriminatorily applied against Negroes at least in rape cases. One aspect of these results, limited to the State of Arkansas, was presented in the record in *Maxwell v. Bishop*, 385 U.S. 650 (1967).

the face of death.[3] Common state practice makes no provision for the furnishing of legal counsel to these men.

(4) For these reasons, *amici* LDF and NORI have undertaken a major campaign of litigation attacking on federal, constitutional grounds several of the most vicious common practices in the administration of capital criminal procedure, and assailing the death penalty itself as a cruel and unusual punishment. The status of that litigation is described more fully elsewhere. Suffice it to say here that we represent or are assisting attorneys who represent, more than half of the 400 men on death row in the United States; and the lives of virtually all of these men will be affected by the Court's decision in this and the other cases now before the Court on the death penalty.

(5) Counsel for the petitioner in *Moore* has consented to the filing of a brief *amici curiae* by the

[3]Recently, in connection with *Adderly v. Wainwright*, 272 F. Supp. 530 (M.D. Fla. 1967) LDF lawyers were authorize by court order to interview all of the condemned men on death row in Florida. The findings of these court-ordered interviews, subsequently reported by counsel to the court, indicated that of 34 men interviewed whose direct appeals had been concluded, 17 were without legal representation (except for purposes of the *Adderly* suit itself, a class action having as one of its purposes of declare their constitutional right to appointment of counsel); 11 others were represented by volunteer lawyers associated with the LDF or ACLU; and in the case of 2 more, the status of legal representation was unascertained. All 34 men (and all other men interviewed on the row) were indigent) the mean intelligence level for the death row population (even as measured by a nonverbal test which substantially overrated mental ability in matters requiring literacy, such as the institution or maintenance of legal proceedings) were below normal; unrepresented men were more mentally retarded than the few who were represented; most of the condemned men were, by occupation, unskilled, farm or industrial labors; and the mean number of years of schooling for the group was a little over eight years (which does not necessarily indicate eight grades completed).

N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as has counsel for the respondent State of Illinois.

Wherefore, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971
No. 69-5001

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Brief of N.A.A.C.P. Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent.

Statement of Facts.

Petitioner was found guilty of murder before the Circuit Court, Cook County, State of Illinois, and sentenced to death. The conviction and sentence were upheld by the Supreme Court of Illinois in *People v. Moore*, 42 Ill.2d 73, 246 N.E.2d 299 (1969). A petition for a writ of certiorari was filed with the Court on June 23, 1969, supplemented on July 20, 1970, and granted on June 28, 1971. There are three questions before the Court, only one of which is discussed in this brief, namely, eight veniremen were removed for cause when they voiced general objections to capital punishment or stated that they had religious or conscientious scruples against the death penalty in a proper case; in the light of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), may a state court of review affirm a death sentence,

(a) on the ground that the tenor of *voir dire* examination was unlike that of *Witherspoon?*

(b) on the ground that the prosecution had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon?*

Summary of Argument.

We urge the Court to reverse the imposition of the death sentence in this case on the grounds that the jury selection process resulted in the unconstitutional exclusion of veniremen who voiced general objections to the death penalty. The exclusion of these veniremen was contrary to the Court's decision in *Witherspoon v. Illinois,* 391 U.S. 510 (1968). We further urge the Court to amplify its *Witherspoon* decision to end, once and for all, continued efforts by some lower courts to improperly avoid the impact of *Witherspoon* by focusing on irrelevant distinctions such as those drawn by the court below in this case.

ARGUMENT.

I.

The Death Penalty Cannot Be Carried Out in This Case Because Veniremen Who Voiced Mere General Objections to the Death Penalty Were Removed From the Jury Which Imposed the Sentence.

In the case before the Court, twelve veniremen were removed from the jury panel because of reservations they had concerning imposition of the death penalty. An excerpt from the *voir dire* covering the questioning of each of the excluded veniremen is set forth in the Appendix attached hereto. The only relevent question is whether any of these veniremen were removed contrary to the standards set forth in *Witherspoon*.

In *Witherspoon* this Court held that:

> "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois, supra* at 522.

A narrow reading of *Witherspoon* makes it clear that any test used to determine whether a venireman has been properly excluded from a capital case must *at least* be consistent with the Court's statement that its decision had no bearing on a State's power to exclude veniremen who make it

> ". . . unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the

> death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Witherspoon v. Illinois, supra* at 522-23 n. 21.

Thus, at a minimum, *Witherspoon* says that a venireman may not be excluded for cause because of his views on the death penalty unless: (1) his views are unmistakably clear, *and* (2) his views would automatically compel him to vote against imposition of the death penalty *or* would prevent him from making the required impartial determination of guilt or innocence.

It is also clear that *Witherspoon* will countenance no exclusions made on any broader basis than that stated by the Court in footnote 21. Before stating its minimum requirements for exclusion, the Court cautioned in the very same footnote that:

> "[i]f the *voir dire* testimony in a given case indicates that veniremen were excluded on *any broader basis* than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevent jurisdiction would appear to support only a narrower ground of exclusion." (Emphasis added.)

Lastly, it is clear that in deciding whether a venireman has been properly excluded, any ambiguity which casts doubt upon whether he has made his views unmistakably clear must be resolved against exclusion. Judge Simpson, writing for a unanimous court reversing for violation of *Witherspoon* in *Marion v. Beto*, 434 F. 2d 29, 31 (5th Cir. 1970), noted:

> "The Supreme Court further implied that doubts concerning the ability of a venireman to subordi-

nate his personal views to his oath as a juror to obey the law of the state should be resolved against exclusion, stating in footnote 9, on page 515-516 of the opinion, 88 S. Ct. on page 1774:

> "'Unless a venireman states *unambiguously* that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that this is his position.' (Emphasis added.) [Footnote omitted.]"

It is clear that each of the excluded veniremen were removed from the jury in this case *solely* because they voiced "general objections to the death penalty or expressed conscientious or religious scruples against its inflictions". Veniremen Byrne, Lorens, Kristock, Petty, Threatt, Gorski and Hohnwald were excluded merely because they said that they did not believe in capital punishment or that they had religious or conscientious scruples against infliction of the death penalty in a proper case. In *Witherspoon*, this Court specifically considered "proper case" exclusions and declared:

> "[I]t cannot be assumed that a juror who described himself as having 'conscientious or religious scruples' against the infliction of the death penalty or against its infliction 'in a proper case' [Citations] thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him.' [Citations] Obviously many jurors 'could, notwithstanding their conscientious scruples [against capital punishment], return . . . [a] verdict [of death] and . . . make

their scruples subservient to their duty as jurors.' [Citations] Yet such jurors have frequently been deemed unfit to serve in a capital case. [Citation] "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors. Any 'layman . . . [might] say he has scruples if he is somewhat unhappy about death sentences . . . [Thus] a general question as to the presence of . . . reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases.' Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that this is his position." *Witherspoon v. Illinois*, *supra* at 515-16 n. 9.

The inherent ambiguity in almost any question that asks whether a venireman could return the death penalty in a "proper case" is that the venireman might easily assume that the law classifies certain kinds of cases as "proper." The only way that a transcript can indicate that the venireman did not so interpret the question is by showing a clear explanation to him that the jury, in its sole discretion, decides what is a proper case for imposition of the death penalty. Nothing in the record indicates that such an explanation was given to the veniremen excluded in this case.

Veniremen Burns, Peterson and Nakata were apparently excluded merely because they stated "strong

feelings" against capital punishment.[1] Venireman Larsen did not even go that far. The trial judge and the prosecutor did all his talking on the record for him. And even Venireman Webber's statement that he "wouldn't be able to sign a death penalty" falls far short of the "unmistakably clear" test of *Witherspoon*. This Court's opinions in *Witherspoon* and its progeny can leave no doubt that these exclusions were in violation of the Constitution.

In *Boulden v. Holman*, 394 U.S. 478 (1968), this Court specifically considered whether veniremen might be excluded "merely by virtue of their statements that they did not 'believe in' capital punishment." *Id.* at 483. That opinion makes it abundantly clear that exclusion on any such "broader basis" will not pass muster. In *Boulder*, pains were taken to spell out what should have been obvious:

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[1]Statements made by Veniremen Nakata also suggest that he may have had some reservations about giving the death penalty in the case before the court, and these reservations may have been the basis for his exclusion. If this was the basis, his exclusion too was in violation of *Witherspoon*:

> "Just as veniremen cannot be excluded for cause on the ground that they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrow ground of exclusion." *Witherspoon v. Illinois, supra,* at 522 n. 21.

> "[I]t is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." *Id.* at 483-84.

In *Maxwell v. Bishop*, 398 U.S. 262 (1970), this Court specifically considered whether a venireman could be removed because he entertained religious or conscientious scruples against imposing the death penalty. Once again, the patent unconstitutionality of such exclusions was declared:

> "'[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.' 391 U. S., at 522. We reaffirmed that doctrine in *Boulden v. Holman*, 394 U. S. 478. As we there observed, it cannot be supposed that once such people take their oaths as jurors they will be unable 'to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.' 394 U. S., at 484. 'Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.' *Witherspoon v. Illinois, supra*, at 516 n. 9.

> "The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out . . . ." *Id.* at 265-66.

Lastly, the record in this case fails to show with respect to each of the *Witherspoon* criteria that the trial judge made any effort to specifically instruct any excluded venireman that the law required a juror to "subordinate his personal views to what he . . . [perceives] to be his duty to abide by his oath as a juror and to obey the law of the State," *Witherspoon v. Illinois, supra* at 514-15 n. 7. Thus, it simply cannot be said that any of the excluded veniremen made their views "unmistakably clear." As this Court noted in *Witherspoon:*

> "Obviously many jurors 'could, notwithstanding their conscientious scruples [against capital punishment], return . . . [a] verdict [of death] and . . . make their scruples subservient to their duty as jurors.'" *Witherspoon v. Illinois, supra* at 516 n. 9.

Hence, because the trial judge failed to instruct excluded veniremen as to their duty to subordinate their own personal views to the commands of the law as explained to them by the court, and because the trial judge failed to clearly determine that the excluded

veniremen could not subordinate their personal views and "abide by the law," each of the veniremen excluded in this case were removed in violation of this Court's pronouncement in *Witherspoon* and its progeny.

Nevertheless, in this case the Supreme Court of Illinois, relying on its earlier decision in *People v. Speck*, 41 Ill. 2d 177, 242 N.E.2d 208 (1968), upheld the death sentence on the grounds that "[t]he tenor of the entire examination . . . was unlike *Witherspoon* where the trial court promply removed all who expressed the slightest qualms about capital punishment", *People v. Moore, supra* at 82; 246 N.E.2d at 305 and because "[i]t is also clear in this case the State had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon*". *Id*, at 84; 246 N.E.2d at 306. Neither factor referred to by the lower court justified upholding the death sentence in the face of *Witherspoon*.

II.

The Question of Whether the Tenor of the Voir Dire in This Case Differed From That in Witherspoon Is Irrelevant to the Issue of Whether Veniremen Were Improperly Excluded.

The Illinois Supreme Court held that the death sentence could be imposed in this case because *Witherspoon* only applied to cases where veniremen were hastily and perfunctorily excused for voicing the slightest qualms regarding the death penalty. *People v. Moore, supra* at 83-84; 246 N.E.2d at 305-06. Led by the Illinois Supreme Court, a number of lower courts have likewise professed to recognize *Witherspoon's* tests, but have proceeded to avoid applying them.

The leading case is *People v. Speck, supra.* In that case the Illinois Supreme Court conceded that as

many as 50 veniremen had been excused "because they stated that they had conscientious scruples concerning the death penalty without stating that they would never impose or consider imposing it." *Id.* at 213; 242 N.E.2d at 227. Although clearly in violation of *Witherspoon's* requirements, the Illinois Court upheld the imposition on the sentence on the grounds that

> ". . . the tone of the proceedings here indicate a sincere desire on the part of the prosecutor and the court (although perhaps not shared by the defense) to determine the jurors' qualifications according to the standard later held acceptable in *Witherspoon.*" *Id.* at 209; 242 N.E.2d at 225.

The emphasis in *Speck* and later cases on the "tone of the proceedings" disregards the language and intent of *Witherspoon.* In *Speck, Witherspoon,* as well as in the present case, veniremen were excused for voicing mere general objections to the death penalty. In *Witherspoon* this Court said:

> "The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out. . . ." *Witherspoon v. Illinois, supra* at 516 n. 9.

On June 28, 1971, this Court reversed the death sentence in *Speck.* Just as the death sentences in *Wither-*

spoon and *Speck* have been reversed, so too must the death sentence in this case be reversed.

III.

The Availability of Peremptory Challenges to the State Does Not Render Harmless the Improper Exclusion of Veniremen Under Witherspoon.

The Illinois Supreme Court also upheld imposition of the death sentence in this case on the grounds that the state had sufficient peremptory challenges to have eliminated those prospective jurors improperly excluded under *Witherspoon*.[2] This argument was first suggested in *State v. Mathis*, 52 N.J. 238, 245 A.2d 20 (1968), *reversed as to judgment imposing death sentence*, ... U.S. ..... (1971), as a "relevant makeweight:"

> "And we think it correct to add that if the prosecution did not use all its peremptory challenges, that fact may be a relevant makeweight, for it is not unreasonale to assume that the remaining challenges would have been used, had the trial court ruled against the State on its objection to a specific juror. Here the State used only 7 of its 12 peremptory challenges." *Id.* at 251, 245 A. 2d at 27.

This argument would better be characterized as an irrelevant makeweight. It is purely conjectural whether the State would have used its peremptory challenges to exclude the scrupled veniremen. *Witherspoon* nowhere mentions the effect of the existence of remaining prosecution peremptory challenges. When a right as vital as a

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[2]The record disputes this finding. The state used 16 of its 20 peremptory challenges. Had the four remaining challenges been used, there would still have been at least four and probably eight improperly excused veniremen. (See Trial Record pp. 146, 162, 242, 269, 277, 281, 303, 322, 329, 342, 346 and 350.)

defendant's right to have a jury which is not unfairly "stacked" to condemn him to death is at issue, conjectural suggestions about whether a prosecutor might have used his peremptory challenges to remove a scrupled veniremen should not be permitted to override a clearly justifiable claim that some veniremen were excluded for cause in violation of *Witherspoon*.

This was the decision of the California Supreme Court in *In Re Anderson*, 69 Cal.2d 613, 619-20 (1968), wherein Justice Burke dealt with the "remaining peremptories" argument as follows:

> "The Attorney General also contends that any error under *Witherspoon* in excusing for cause prospective jurors opposed to the death penalty is nonprejudicial where, as here, the prosecution had sufficient peremptory challenges to remove all such jurors. The Attorney General asserts that since the chances of a jury's being able to determine the penalty impartially are diminished if the jury contains even one person who is hostile to, or has reservations concerning the death penalty, it may be assumed that, if the challenges for cause had not been available, the prosecutors would have excluded the veniremen in question by way of peremptory challenge; that a prosecutor may constitutionally exercise his peremptory challenges in a particular case for any purpose he deems proper (*Swain v. Alabama*, 380 U.S. 202, 221-222); and that therefore any error in excluding for cause the veniremen in question did not affect the composition of the juries at petitioners' trials and is not a ground for vacating the death sentences.
>
> "We do not agree. *Witherspoon* did not discuss the effect of the existence of remaining peremptory

challenges of the prosecution, but the broad language of the opinion establishes without doubt that in no case can a defendant be put to death where a venireman was excused for cause solely on the ground he was conscientiously opposed to the death penalty. According to our understanding of *Witherspoon,* reversal is automatically required if a venireman was improperly excused for cause on the basis of his opposition to the death penalty. It may be noted that in *Witherspoon* the *defense* had three remaining peremptory challenges when it accepted the jury, but that fact was not viewed as showing that the jurors who were impaneled were impartial and that therefore no harm resulted from improperly excusing for cause some prospective jurors. Furthermore, in arguing that it may be assumed that the prosecutor would have used his peremptory challenges to remove veniremen who under *Witherspoon* were improperly excused for cause, the Attorney General bases his argument on a concept of an impartial jury that is in conflict with the majority opinion in *Witherspoon.* Under the view of the *Witherspoon* majority a jury from which all prospective jurors opposed the death penalty have been excluded is not an impartial jury but rather constitutes a 'hanging jury,' one that is 'uncommonly willing to condemn a man to die,' and one that 'cannot speak for the community' but 'can speak only for a distinct and dwindling minority.' We cannot engage in conjecture that the prosecutor would have used his peremptory challenges to excuse all such jurors."

Conclusion.

As this Court has repeatedly recognized, the selection of a jury in any case, and particularly in a capital case, is of critical importance. Cases like *Speck* and *Mathis* indicate that lower courts have resisted the thoroughgoing application of *Witherspoon* which this Court intended. The most effective way to achieve such application is for this Court to specifically state that the improper exclusion of even one juror under *Witherspoon* will result in reversal of the death sentence.

There is no room for a *de minimus* doctrine regarding selection of a jury in a capital case. Every capital defendant should be entitled to a jury from which no prospective jurors were excluded for cause as a result of their general objections to the death penalty.

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APPENDIX.

Excerpts From the Record on Voir Dire Examination.

Page of Record

57 Prospective jurors sworn to answer questions.

116 MALACHY BURNS, prospective juror:

117 Q. I see. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. I have a strong feeling against capital punishment, Judge.

Q. I see. And do you think that that feeling is such as would influence your judgment in this case?

A. It very well might.

The Court: What about it gentlemen? Mr. Horka, Mr. Mack.

118 Mr. Mack: Well, Judge,—

The Court: You may be excused.

Mr. Horka: Judge, he said it might or could. He hasn't made up his mind yet.

The Court: You may be excused. Step down, please.

Mr. Mack: For cause?

The Court: For cause, yes.

118 ESTHER BYRNE, prospective juror:

122 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. Well, ordinarily enough, I take the same stand as Mr. Byrne. I don't believe in capital punishment.

Q. In other words, even if we have a law in this State to that effect, you wouldn't believe in it. anyway?

Page of Record

A. No, I don't, definitely not.

The Court: Very well. That's your prerogative. You're excused for cause.

146 PAUL LARSEN, prospective juror:

147 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. Well, I don't know whether I understand capital punishment. Is it death for death, an eye for an eye, a tooth for a tooth?

Q. Listen, in a murder case, the jury has a 148 duty to determine, first, whether the defendant is guilty or not guilty. You will be given multiple verdicts in this case. If you decide he is not guilty, that ends the case. Do you understand?

A. Yes.

Q. If you decide he is guilty of murder, then you must next determine whether or not you wish to return a verdict of death. If you so decide on a verdict of death, you will so indicate in your verdict. If you have determined the guilt of the defendant and decide against a verdict of death, you will return a verdict of guilty and the court will fix the term of punishment.

Do you understand that?

A. The court, the judge will?

Q. That's right, that's right. The law in this State, in a murder case, allows multiple verdicts. The first thing you decide is whether he is guilty or not. If you decide he is not guilty, that ends it. The jury after finding him guilty, will have to decide whether or not they want to inflict the death penalty. If you decide that you don't want to in-

Page of
Record

flict the death penalty, you will say so and then the court will fix his punishment but it shall
149 not be death. The court cannot fix the death penalty unless the jury, having been asked for it, decides that.

Do you understand that?

A. In other words, when we go back to decide the verdict, we can either vote against the death penalty or for it?

Q. Oh, yes. The first thing that you have to determine is—

A. And what classifies that, the majority or they all have to vote the same way?

Q. No majority verdicts on anything in this State. It has to be the unanimous verdict of the twelve people on each one of those things, first, guilt or innocence. After that determination, if it's guilt then you go ahead and decide whether you want to inflict the death penalty or not.

A. Well, sir, I think I have to commit myself. I believe in the Bible, "Thou shalt not kill."

Q. The Bible has a lot of things in it.

A. That's one of the ten commandments.

Q. And I haven't seen any responsible religious official who says the Bible admonishes a jury not to follow the law.

150 A. That might be.

Q. What's that?

A. That might be.

The Court: I thought that's the highest thing, the law of God and then the law of man. But if that's your position, then, we will excuse you.

(Prospective juror excused.)

Page of
Record

LOUIS LORENS, prospective juror:

151 Q. Do you know of any reason why you cannot
152 be a fair and impartial juror in this case?

A. I do not believe in capital punishment.

The Court: Well, step down.

(Prospective juror excused.)

210 KATHERINE KRISTOCK, prospective juror:

212 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. I'm afraid I do. I don't believe in capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

221 ISAAC NAKATA, prospective juror:

222 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. I have a very strong prejudice against the use of capital punishment.

Q. I see.

A. Except in very limited area.

Q. Well, the law of this State prescribes capital punishment in certain types of cases,
223 and murder is one of them. Now, as I stated before, the jury will have to determine whether

Page of Record

the defendant is guilty or not guilty of the charge that has been made against him.

A. Yes, sir.

Q. Then the jury will also have to consider whether it's a proper case for the death penalty. Now, do you believe that the State could present a case proper for the death penalty?

A. Yes, sir.

228 A. That's the reason why I would like to give my reasoning right now, before I perjure myself about that personally, because I can't go all the way on capital punishment.

Q You can't go all the way?

A. No.

Q. Where do you sop?

A. It depends on the kind of crime it is and the evidence presented for it.

Q. Oh, that's all we are asking you to do.

A. Well, it seems to me, from the statements made by the prosecuting attorney, that he is going to ask for the death penalty, so, in view of that fact, I think I should disqualify myself.

Q. If he asks for it, it doesn't mean that you have to give it to him.

A. Of course, that's true, too. But, at the same time, though, I mean, I wouldn't be applying the law, as he stated it, you see, upon his presentation of the evidence, and all that, so I don't think I would be fair to the court or to the rest of the jurors by my being on the jury.

The Court: Step down, then if you don't think

Page of Record

229 you can be fair. I'm not going to ask you to try any further. The only question is, we want you to be fair and impartial.

(Prospective juror excused.)

248 MARIAN PETERSON, prospective juror:

250 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I have very strong convictions against capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

NEBRASKA PETTY, prospective juror:

252 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of a death penalty in a proper case?

A. I do.

The Court: Step down.

(Prospective juror excused.)

308 JACQUELINE B. THREATT, prospective juror:

309 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

Page of Record

A. Yes, I do.

Q. You do: What do you mean?

A. I don't believe in capital punishment.

Q. Say that again.

A. I feel very strongly against capital punishment.

The Court: Step down, please. Call another juror.

325 ALBERT WEBBER, prospective juror:

Q. The gentleman on the end, your name, sir?

A. . .Albert Webber. Your Honor, I wouldn't be able to sign a death penalty.

Q. You wouldn't?

A. No, sir.

The Court: All right. Step down, Mr. Webber.

350 MARY GORSKI, prospective juror:

352 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do, your Honor.

The Court: All right, step down.

365 ANNA L. HOHNWALD, prospective juror:

366 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

a. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. Step down, please.